

2:21-cr-00002-JAD-NJK-1 - November 7, 2022

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEVADA

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) Case No. 2:21-cr-00002-JAD-NJK
5 vs.) Las Vegas, Nevada
6 STEPHON JAMES WHITNEY,) November 7, 2022
7 Defendant.) 11:02 a.m. - 12:38 p.m.
8) Courtroom 6D
9) IMPOSITION OF SENTENCE, DAY 1
10) **CERTIFIED COPY**
11)

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS, DAY 1
13 BEFORE THE HONORABLE JENNIFER A. DORSEY
14 UNITED STATES DISTRICT COURT JUDGE
15
16

17 APPEARANCES:

18 For the Government: **DANIEL COWHIG, AUSA**
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24 (Appearances continued on page 2.)
25

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1 APPEARANCES CONTINUED:

2 For the Defendant:

3 **YI LIN ZHENG, ESQ.**

4 VEGAS GOLDEN LAW

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8 Also Present:

9 Sunny Cascio, USPO

10 * * * * *

11 **I N D E X**

12 Government's Witness:

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13 **JOSH COSTELLO**

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18 * * * * *

19 **E X H I B I T S**

20 EXHIBIT NO.:

OFFERED

RECEIVED

WITHDRAWN

21 Gov't 1 33 33

22 Gov't 2 28 28

23 Gov't 3 - 17 23 23

24 Gov't 18 33 34

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1 LAS VEGAS, NEVADA; MONDAY, NOVEMBER 7, 2022; 11:02 A.M.

2 --o0o--

3 P R O C E E D I N G S

4 **COURTROOM ADMINISTRATOR:** Now's the time set for an
5 imposition of sentence in Case Number 2:21-cr-02-JAD-NJK,
6 United States of America versus Stephon James Whitney.

7 Counsel, please state your appearances.

8 **MR. COWHIG:** Good morning, Your Honor. Dan Cowhig
9 from the U.S. Attorney's Office. I have here at counsel table
10 the case agent, LVMPD Detective Josh Costello.

11 **MS. ZHENG:** And good morning, Your Honor. Yi Lin
12 Zheng, counsel on behalf of Defendant Stephon Whitney who is
13 present in custody.

14 **THE COURT:** All right. Good morning.

15 This is the hearing set for the imposition of the
16 sentence on Mr. Whitney in this case. Back in June he
17 appeared before the Court and he pled guilty to being a felon
18 in possession of a firearm. He did so without the benefit of
19 a plea agreement. I accepted his guilty plea and adjudicated
20 him guilty of that charge.

21 In the PSR Probation has calculated the offense level
22 to be a 25 and recommends a sentence of 100 months. The
23 defense has filed a sentencing memo, and it argues for a
24 sentence of 28 months. The Government filed a sentencing memo
25 in which it argues for a sentence of 110 months followed by

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1 three years of supervised release.

2 It appears that virtually every aspect of this
3 sentencing is objected to or disputed. So I think this is
4 going to be an extensive hearing, but I'm going to let
5 everyone know that I have a number of other hearings today.
6 So my assumption at this point -- and I'm not certain this
7 will go this way. But if we go beyond the noon hour or it
8 looks like it's going to go beyond the noon hour, we will have
9 to extend this sentencing. There are so many issues here, and
10 it's possible, based on whatever additional evidence that is
11 received today, that I might need to do some additional
12 research or investigation on my own into the sentencing file
13 regardless. So just giving everyone a heads-up that there's a
14 lot going on here.

15 So let's go ahead, though, and start with the PSR and
16 see where that leads us.

17 Ms. Zheng, you have reviewed the PSR carefully with
18 your client; is that correct?

19 **MS. ZHENG:** I have, Your Honor.

20 **THE COURT:** And let's talk about unresolved
21 objections so that I'm -- I'm clear on where we need to go.

22 So if you want to walk me through the still
23 unresolved objections, please.

24 **MS. ZHENG:** Sure, Your Honor.

25 So Objections 1 and 2 were in -- I'd asked that the

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1 language be corrected to reflect that Mr. Whitney has been in
2 continuous custody since his arrest on September 2nd, 2020.
3 That has been resolved.

4 **THE COURT:** Okay. Hang on one second. Let me just
5 mark that.

6 Okay. Next.

7 **MS. ZHENG:** As to Objection 3, as to the information
8 regarding Kevin Lay, I have no reason to dispute or not
9 dispute that. I just thought it was unrelated to the case,
10 but if I stand corrected, then...

11 **THE COURT:** Let me ask Probation, what is that
12 information based on? So information from the detention
13 center?

14 **PROBATION OFFICER:** It looks like, yes, information
15 from the detention center.

16 **THE COURT:** Okay. And so, Ms. Zheng, do you have any
17 information or documents or evidence to refute that at this
18 point?

19 **MS. ZHENG:** I don't. I think we can let that stand.
20 I -- it was an incident that I think happened while he was in
21 custody. I've no reason to dispute that they were given just
22 a warning.

23 **THE COURT:** Okay. Do you withdraw the objection?

24 **MS. ZHENG:** Yes.

25 **THE COURT:** Okay. Next?

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1 **MS. ZHENG:** Primarily the remainder -- the other
2 objections relate to what I think will later on be discussed
3 into the four-level enhancement, in connection with
4 enhancement. So, as of right now, those are still... in
5 dispute. So that goes to Objection Number 4, Objection
6 Number 5...

7 **THE COURT:** Okay.

8 **MS. ZHENG:** ...is predominantly with the four level
9 in connection with enhancement.

10 Objection Number 6 is still pending, dispute as to
11 the change of his criminal history, in which case it would
12 also coincide with the fact that, regardless of what happens
13 and the Court's calculation of Stephon's criminal history
14 points, ultimately paragraph 33 in the amended PSR will also
15 have to change to reflect the subsequent history of the case.

16 And I think that's it. So Objections 1 and 2 are
17 resolved. Objection 3 is withdrawn. Four and -- 4, 5, and 6
18 are still in dispute.

19 **THE COURT:** Okay. Does the Government have any
20 position on those other than to address -- I know the
21 Government intends to present some evidence regarding the
22 four-level enhancement, and how about with respect to the
23 criminal history point?

24 **MR. COWHIG:** Your Honor, with respect to the criminal
25 history point, we submitted documentary evidence to the Court

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1 showing the history of that case and the changes to the case.
2 We believe that the Probation Office has appropriately
3 addressed that change in their response to that objection. We
4 believe that change is ineffective to change Mr. Whitney's
5 criminal history in terms of this Court's calculations. Very
6 clearly, a state court cannot simply at a whim wipe out a
7 conviction to alter the sentencing guidelines in a federal
8 case.

9 **THE COURT:** All right. So let's -- I mean, really,
10 the key issue here is that four-level enhancement.

11 So I understand, Mr. Cowhig, that you intend -- the
12 Government intends to present evidence today in support of
13 that four-level enhancement; is that right?

14 **MR. COWHIG:** Yes, Your Honor.

15 **THE COURT:** All right. I'll let you go ahead and
16 start with that then. I assume you are calling the case
17 agent?

18 **MR. COWHIG:** Yes, Your Honor.

19 **THE COURT:** All right. Go ahead.

20 **MR. COWHIG:** The Government will call Las Vegas
21 Metropolitan Police Department Detective Josh Costello.

22 **COURTROOM ADMINISTRATOR:** Please raise your right
23 hand.

24 *(The witness is sworn.)*

25 **THE WITNESS:** Yes, ma'am, I do.

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1 **COURTROOM ADMINISTRATOR:** Thank you.

2 Please have a seat. And will you please state and
3 spell your name for the record.

4 **THE WITNESS:** My name is Josh, J-o-s-h. Last name is
5 Costello, C-o-s-t-e-l-l-o.

6 **THE COURT:** You may inquire.

7 **MR. COWHIG:** Thank you, Your Honor.

8 **DIRECT EXAMINATION**

9 **BY MR. COWHIG:**

10 Q. Good morning, Detective Costello.

11 A. Good morning, sir.

12 Q. Where do you work?

13 A. I work for the Las Vegas Metropolitan Police Department.

14 Q. And what's your duty position there?

15 A. I'm currently assigned as a detective in the Central
16 Intelligence Unit.

17 Q. What does the Central Intelligence Unit cover?

18 A. A myriad of things. We gather and disseminate
19 information and intelligence related to any and all crimes
20 occurring within our respective area of responsibility here in
21 Clark County.

22 Q. Could you tell the Court a little bit about your
23 background, training, and experience.

24 A. I worked for Las Vegas Metro now for about 16 and a half
25 years, coming up on 17 in April. I was in patrol for six

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1 years. I then went to the gang unit where I became a
2 detective with gang enforcement. I later became a detective
3 for the gang intelligence unit where I remained until 2015
4 when the gang unit was at that time disbanded. Then, from
5 2015 until 2017, I worked as an intel detective in our
6 criminal intelligence unit. And then, in 2017, they created
7 the central intelligence unit, and at that point I came back
8 to the central intelligence unit where one of my major
9 functions still remains the gang intelligence component.

10 Q. Did you have essentially identical duties on September
11 2nd, 2020?

12 A. Yes, sir, I did.

13 Q. Do you know the defendant, Stephon Whitney?

14 A. I do. He's seated there at the defendant's table wearing
15 the gray shirt and white sleeves.

16 MR. COWHIG: Your Honor, if the record can reflect
17 the witness has identified the defendant?

18 THE COURT: It will so reflect.

19 MR. COWHIG: Thank you, Your Honor.

20 BY MR. COWHIG:

21 Q. How did you come to know Stephon Whitney?

22 A. On August 28th, my team was working with marked uniform
23 officers conducting surveillance related to a gang hood day
24 party that was occurring --

25 Q. I'm sorry, was that August 28th of 2020?

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1 **A.** I apologize. Yes, it was August 28th, 2020.

2 And during that time the patrol officers conducted a
3 traffic stop on a -- like a multi-person, like party bus kind
4 of vehicle. Ultimately, as a result of that traffic stop,
5 three firearms were located inside of the vehicle, and all the
6 occupants were to be identified and then ultimately released.

7 During that time, in 2020, it was a period of social
8 unrest across the country. Tensions were very high. There
9 had been numerous incidents around town. During that traffic
10 stop an individual turned on Facebook Live and began to
11 broadcast the location of the stop and asked additional people
12 to please come to the location of the stop to try to ask law
13 enforcement to let them go. Ultimately, people did begin to
14 arrive, and the decision was made that evening that we would
15 arrest the few people that we had currently already
16 established probable cause on, we would identify the other
17 subjects in the vehicle, and follow up at a later time because
18 we didn't want to escalate the situation any further and
19 endanger the officers or the citizens.

20 **Q.** Was the defendant one of the individuals in that vehicle?

21 **A.** He was one of the subjects in the vehicle. However, on
22 the night in question he did not identify himself correctly.
23 He provided a false name, which in the following days I was
24 able to positively identify him as being Stephon Whitney,
25 which then led to our second interaction.

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1 Q. What did you decide to do as a result of that
2 information?

3 **A.** I learned that Mr. Whitney was currently on probation,
4 and at that point I knew he was a convicted person and I
5 needed to get a sample of his DNA to compare to the firearms
6 that were on the bus due to no one claiming ownership.

7 So I notified his probation officer of record,
8 Officer Vargas, and advised him that I had probable cause to
9 obtain a search warrant from Mr. Whitney.

10 Based on that information, Officer Vargas indicated
11 that he was newly appointed as the officer for Mr. Whitney,
12 and he asked if I would be willing to accompany him at a later
13 time when he went to go do a house check at Mr. Whitney's
14 residence.

15 Q. And did you do that?

16 **A.** I did.

17 Q. What date was that?

18 **A.** That was on September the 2nd of 2020.

19 Q. What happened on September 2nd of 2020?

20 **A.** We met with parole and probation officers in advance of
21 the house visit. We informed them that we had the probable
22 cause to obtain the search warrant for Mr. Whitney's DNA.
23 Detective Cook from North Las Vegas was with us as well as
24 part of my task force. Mr. Cook had probable cause to arrest
25 Mr. Whitney for providing false information to him the night

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1 of the traffic stop. We went to the residence. The LVMPD and
2 North Las Vegas task force personnel remained inside of our
3 vehicle while parole and probation approached the residence.
4 They contacted Mr. Whitney by phone. He exited the residence.
5 They then took him and went back into the house, and --

6 Q. Was that process based upon COVID protocols at the time?

7 A. Yes. During that time, they were meeting in person
8 outside due to COVID protocols. Mr. Vargas determined that he
9 wanted to do a home search of Mr. Whitney's home, and so he
10 took Mr. Whitney inside of the residence while we remained
11 outside.

12 After a period of time, I received a phone call from
13 Mr. Vargas stating that he had located two firearms magazines
14 inside Mr. Whitney's bedroom, and he asked me to please come
15 into the residence.

16 Q. Just to clarify, that was two magazines for a firearm,
17 not two firearms?

18 A. Yes, two magazines for a firearm.

19 Q. Would you look at the binder of exhibits there in front
20 of you?

21 A. Yes, sir.

22 Q. Have you previously reviewed those documents?

23 A. Yes, sir, I have.

24 Q. What happened when you went into the residence?

25 A. I went and I met with Officer Vargas in Mr. Whitney's

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1 bedroom. Mr. Vargas was holding two firearms magazines in his
2 hand. The magazines for -- two magazines for a firearm, no
3 firearm, in his hand, and he indicated to me that he had found
4 those on the top shelf of the closet. I then instructed him
5 to place those magazines on the bed and let's walk out, we're
6 going to freeze the residence pending the issuance of a search
7 warrant.

8 Q. And which bedroom was this?

9 A. This is the -- the adult bedroom. There's two bedrooms
10 in the residence; a small child's bedroom and then the adult
11 bedroom. It would be the southern-most bedroom in the
12 residence, if I recall correctly.

13 Q. How would you characterize the size of the apartment
14 overall?

15 A. It was very small. It's a duplex. It's one half of a
16 single-story family home. Very small. A small living room,
17 kitchen area when you first initially enter, and then to the
18 right is a very short hallway, which is the little boy's
19 bedroom, a bathroom, and then the bedroom of Mr. Whitney and
20 his girlfriend.

21 Q. And there's also a laundry facility as part of that
22 apartment?

23 A. Yes. It's directly outside of the master -- I -- the
24 master bedroom, if you want to call it that, door. There's a
25 laundry area. It had no doors. It was just right there, a

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1 little nook built into the wall that only fits a washer and a
2 dryer.

3 Q. And did Officer Vargas relate to you which bedroom
4 Mr. Whitney identified as his bedroom to him?

5 A. Yes. He indicated that the bedroom that he was standing
6 in was the one that Mr. Whitney told him that he and his
7 girlfriend were residing in.

8 Q. Do you recall the girlfriend's name?

9 A. Ms. Rodosh, Jessica Rodosh.

10 Q. And was there something about the second bedroom that
11 made it clear that that was a child's bedroom?

12 A. Yes. There was children's toys. There was, like, a
13 Batman, I believe, bedspread. Just very obviously it was the
14 bedroom of a small child. Children's clothes.

15 Q. After learning about the two magazines, what did you then
16 do?

17 A. That's when I applied for the telephonic search warrant
18 for the residence and was granted a warrant by the Honorable
19 Judge Zimmerman.

20 Q. And you executed that search?

21 A. I did.

22 Q. What did -- were there other officers with you who also
23 executed the search?

24 A. There were. At this time the parole and probation
25 officers had left, and my team remained as well as a patrol

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1 supervisor who responded to supervise the service of the
2 warrant.

3 Q. If I could direct you to what's been marked as
4 Government's Exhibit 3 in that binder.

5 A. Yes, sir.

6 Q. Could you describe to the judge what that 3, 4, and 5
7 show?

8 A. Yes.

9 Q. The judge has it --

10 A. Oh --

11 Q. -- a set of the exhibits --

12 THE WITNESS: -- show you, Your Honor.

13 (Reporter instruction.)

14 THE WITNESS: Oh.

15 THE COURT: Go ahead.

16 THE WITNESS: So Exhibit 3 is the bed frame and the
17 headboard for what did contain the mattress prior to the
18 service of the search warrant beginning.

19 Jumping over to 4, you have a view there looking down
20 behind the bed showing the back of the headboard there.

21 THE COURT: And this is all in the adult -- what
22 you've described as the adult bedroom?

23 THE WITNESS: Yeah. If you want to just call it a
24 master bedroom, if you want to call it that, yes.

25 THE COURT: Okay.

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1 **THE WITNESS:** In the adults' bedroom.

2 And then this is -- 5 is going to be a picture
3 looking inside of the headboard. So the headboard has that
4 weird, like, black fibrous cloth that kind of covers the back
5 of -- well, headboards in this case or underneath of couches
6 or whatever. And it had a zipper on it. And when I unzipped
7 the zipper to look inside, there's approximately maybe a
8 three-inch wide gap of the headboard. And what you see there
9 is the firearm and the magazine laying at the bottom of the
10 headboard. It's just been placed in there, sitting in there.

11 **BY MR. COWHIG:**

12 Q. What does Government Exhibit 6 show?

13 A. Six is -- at this point I have recovered that firearm
14 from inside of that headboard, and I'm holding it there prior
15 to placing it inside the evidence bag.

16 Q. Government Exhibit 7?

17 A. Seven is the additional magazine that was also located
18 inside of the headboard next to the firearm which was fully
19 loaded.

20 Q. And Government Exhibit 8?

21 A. Eight is a paper sleeve containing money. Kind of like
22 when you go to a bank, if you make a deposit or withdrawal,
23 they put it inside that little paper sleeve. That's what that
24 is.

25 Q. These images show no mattress on the bed frame and a

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1 bunch of other stuff moved around. Is that a result of your
2 search?

3 **A.** Yes, sir, it is.

4 **Q.** If someone knew that firearm was inside the headboard,
5 would it be hard for them to access?

6 **A.** No. It literally took just a moment to zip open the
7 zipper, and you can reach right in and grab it.

8 **Q.** And how far in terms of feet was this from the closet
9 where the initial magazines were found?

10 **A.** The room wasn't very big. Maybe 10 feet. It was just
11 across. So if you're looking at the bed (indicating) this way
12 as the court lies, like Your Honor and I are looking --
13 there's a men's and women's side of the bed; right? We all
14 know that if we're married or we have a significant other. So
15 the right side of the bed was the men's side. It had
16 Mr. Whitney's prescriptions and other things belonging to him
17 on that side. And then this side (indicating), items
18 belonging to Ms. Rodosh. And then directly next to that there
19 was a small walkway between what would have been a closet and
20 the bed. And so maybe 10 feet across from where the -- where
21 those magazines were located on the top shelf to where -- in
22 the lower right-hand corner of the bed frame is where the --
23 if you're looking at it, the lower right-hand corner of the
24 bed frame is where the firearm was located.

25 **Q.** Would you look at Government Exhibit 9, please, and tell

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1 the Court what that shows.

2 **THE COURT:** And when you say, so lower right-hand
3 corner of the bed frame where the firearm was located, that
4 was the side of the bed you were attributing to Mr. Whitney?

5 **THE WITNESS:** Yes.

6 I'm sorry. Government Exhibit 9 is a clothes hamper,
7 and you can see the top of a large glass jar there.

8 **BY MR. COWHIG:**

9 Q. And does 10 show that same jar in a closeup?

10 **A.** It does. There's a closeup photo, and you can see the
11 green, leafy substance believed to be the marijuana there.

12 Q. And Government Exhibit 11?

13 **A.** That is the jar showing that it's about two and a half,
14 three-quarters of the way full of marijuana when we removed
15 it.

16 Q. And was this jar in that same room?

17 **A.** Yes. It was inside that clothes hamper, yes.

18 Q. What does Government Exhibit 12 show?

19 **A.** Twelve shows that, when additional clothing was removed,
20 there was another jar and another plastic bag with marijuana
21 in it.

22 Q. And does 13 show that other jar and the other plastic
23 bag?

24 **A.** Yes, it does.

25 Q. And that other jar has marijuana within a plastic bag

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1 inside it as well as lose marijuana?

2 **A.** Yes. There's a small amount of loose marijuana in the
3 bag that contains it, and you can kind of see the label of
4 whatever strain of marijuana it was that was there on the side
5 of the bag. And then the other plastic bag with additional
6 marijuana in it.

7 **Q.** And was this marijuana tested?

8 **A.** No, it was not.

9 **Q.** Did Mr. Whitney identify this as marijuana?

10 **A.** Yes, he did.

11 **Q.** Would you tell the Court what Government Exhibit 14
12 shows, please.

13 **A.** Government Exhibit 14 is a box of sandwich bags with a
14 digital scale sitting on top of them, and that's on top of the
15 dryer.

16 **THE COURT:** Can I go back one --

17 **THE WITNESS:** Yes, ma'am.

18 **THE COURT:** -- quick second? When you said
19 Mr. Whitney identified this as marijuana, what -- how did he
20 do that?

21 **THE WITNESS:** Later on, I conducted a post-Miranda
22 interview with him at the North Las Vegas Jail, and during
23 that conversation he identified it as being marijuana.

24 **THE COURT:** Okay. Go ahead, Mr. Cowhig.

25 **MR. COWHIG:** Thank you, Your Honor.

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1 **BY MR. COWHIG:**

2 Q. Was there anything noted about that scale in Government
3 Exhibit 14?

4 **A.** Yes. It had small, green, leafy residue on top of it.

5 Q. And where did you say that this box with baggies and
6 scale was found?

7 **A.** Directly outside of the -- we'll just call it the master
8 bedroom. The adult bedroom door, as you're leaving the room,
9 on your left-hand side there was immediately that little
10 laundry nook that contained the washer and dryer. And it had
11 a shelf above the washer and dryer, like where you would have
12 a -- have laundry detergent, dryer sheets, things like that,
13 it was sitting there on that shelf.

14 Q. And Government Exhibit 15?

15 **THE COURT:** And, I'm sorry, can I just go back before
16 we do that?

17 **THE WITNESS:** Certainly, Your Honor.

18 **THE COURT:** Where was this laundry basket that we see
19 in photos... 9, 10, and 12?

20 **THE WITNESS:** So the laundry basket is sitting
21 directly next to the television. The television's on, like, a
22 small stand. The laundry basket is located directly next to
23 it. So if you were lying on the bed, like the headboard is
24 behind us here, this granite wall, and that's the foot of the
25 bed, just beyond that is the far wall of the bedroom. There's

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1 a television, and then immediately to the right of it was the
2 clothes hamper that contained the marijuana.

3 **THE COURT:** All of this then was in the master
4 bedroom?

5 **THE WITNESS:** All of it was in the bedroom, yes,
6 ma'am.

7 **THE COURT:** Thank you.

8 **BY MR. COWHIG:**

9 Q. And then the box of baggies and digital scale was
10 immediately outside of the bedroom?

11 **A.** Just outside of the bathroom in that -- we'll call it the
12 laundry nook where the little cutout was where the washer and
13 dryer are.

14 Q. I'm sorry, bathroom or bedroom?

15 **A.** Just outside the bedroom.

16 Q. And then Government Exhibit 15?

17 **A.** Fifteen are the two magazines that I made mention of that
18 the probation officer was holding in his hands when I entered.

19 Q. That doesn't show where they were found, just where the
20 probation officer put them down?

21 **A.** Exactly. I told him to place them there on the bed.

22 Q. And then Government Exhibit 16 and 17, what do those
23 show?

24 **A.** 16 and 17 show two boxes of Winchester nine millimeter
25 ammunition with a receipt, and I'll let you --

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1 Q. Are you able to read the receipt in Government Exhibit 17
2 or at least portions of it as to who the buyer was?

3 A. On 16, no. On 17, yes. You can see the name Jessica R.
4 Rodosh about halfway down on the receipt just below the total
5 charged.

6 Q. And where -- these were found in a bag?

7 A. So as you're standing looking into the laundry nook -- so
8 as you exit out of the master bedroom, immediately to your
9 left is that laundry nook. If you turn and look to your left
10 into the laundry nook, you have a washer and a dryer, and
11 above it is that shelf where you put soaps, detergents, things
12 like that. There was a shoebox that was sitting on that
13 shelf. When that shoebox was pulled down and looked inside,
14 there was the black plastic bag. You see a portion of that
15 there in Government Exhibit 16. Inside that bag was the
16 ammunition and the receipt.

17 Q. And this was the same area where the box of baggies and
18 digital scale was found?

19 A. Yes. It was sitting a washer's width away to the -- just
20 to the right of it.

21 MR. COWHIG: Your Honor, I'd like to offer Exhibits 3
22 through 17 into evidence.

23 I'm sorry. I should ask the obvious evidentiary
24 question.

25 BY MR. COWHIG:

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1 Q. Do these images depict the search and the items you
2 described as they appeared on that day?

3 A. Yes, sir, they do.

4 Q. And they're a fair and accurate representation of that?

5 A. Yes, sir, they are.

6 THE COURT: Now you move them in?

7 MR. COWHIG: Yes, Your Honor.

8 *(Government Exhibit Numbers 3 through 17, offered.)*

9 THE COURT: Any objection?

10 MS. ZHENG: No, Your Honor.

11 THE COURT: All right. They will come in.

12 *(Government Exhibit Numbers 3 through 17, received.)*

13 BY MR. COWHIG:

14 Q. Regarding the marijuana, what did you note about how this
15 marijuana was packaged?

16 A. There was a large quantity. It was in a -- in a jar.
17 There was a significant amount of marijuana, much beyond what
18 I know to be consistent with personal use.

19 Q. Was there something about the packaging that told you
20 where it may have come from?

21 A. We consistently see in our line of work those large
22 plastic bags like we saw there in that second jar where
23 they're inside of that plastic bag, and then they have that
24 label either on the outside or the piece of paper on the
25 inside that indicates the particular strain of marijuana that

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1 it is, which is not how marijuana is purchased if you purchase
2 it legally at a dispensary.

3 Q. So this packaging is consistent with what you're used to
4 seeing on the illicit market?

5 A. That is correct, sir.

6 Q. And the quantity of marijuana that you saw here, this --
7 I think you already said this would not be typical for an
8 individual user?

9 A. No.

10 Q. Would the cost of this amount of marijuana be potentially
11 out of reach for someone who's out of work and struggling to
12 pay their bills?

13 A. Yes, that would be an accurate representation.

14 Q. Did you find anywhere else in the apartment any
15 indications of marijuana being purchased from a dispensary?

16 A. No, sir, we did not.

17 **THE COURT:** Let me back you up for just a second.
18 You --

19 **THE WITNESS:** Yes, Your Honor.

20 **THE COURT:** -- just testified that the cost of this
21 marijuana would be potentially out of reach for someone who's
22 out of work and struggling to pay their bills. Do you know
23 the estimated value of that marijuana?

24 **THE WITNESS:** Not a narcotics dealer, but based on
25 market price at the time -- it just depends on the strain or

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1 the THC content. I would estimate probably somewhere there
2 around --

3 **MS. ZHENG:** Your Honor, I'm going to object to the
4 speculation of it. Either the detective knows or doesn't.
5 But as to the speculation of the cost of the market value --

6 **THE COURT:** All right.

7 **MS. ZHENG:** -- of it and what's within the bounds --

8 **THE COURT:** I'm going to sustain that for right now.
9 Mr. Cowhig, I'm going to ask, if you want me to
10 consider that testimony about the value of this marijuana, if
11 you can lay a greater foundation for the knowledge of this
12 witness about such costs.

13 **MR. COWHIG:** Certainly, Your Honor.

14 **BY MR. COWHIG:**

15 Q. During the course of your investigations, do you
16 frequently investigate individuals who are selling illicit
17 drugs, particularly marijuana?

18 **A.** Yes, sir, I do.

19 Q. Those prices have a substantial range and vary over time?

20 **A.** That is correct.

21 Q. Do you know, during this time frame of September of 2020,
22 during COVID, what the approximate price of this quantity of
23 marijuana would be?

24 **MS. ZHENG:** Your Honor, I'm going to object again. I
25 don't think that that's a sufficient foundation in regards to

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1 that. The testimony is that it depends on the quantity and
2 the strain. We have neither information about the strain or
3 the type of marijuana that it is. I don't believe that the
4 detective should testify based on pure speculation as to the
5 value.

6 **THE COURT:** Mr. Cowhig, can you -- does this witness
7 know the quantity of this marijuana? Can he testify to that?
8 I just don't know if this is within his knowledge.

9 **BY MR. COWHIG:**

10 Q. Did you seize the marijuana in this case?

11 A. Yes, we did.

12 Q. Did you make a record of that seizure?

13 A. We did.

14 Q. Would you look at Government Exhibit 2 for
15 identification, please.

16 A. You said 2, Counselor?

17 Q. Yes.

18 A. Two... yes, sir.

19 Q. Did you complete that form?

20 A. Yes. This is the LVMPD property report.

21 Q. What does that form say?

22 A. It lists all the items that were taken as evidence during
23 the service of the search warrant.

24 Q. Does it include the quantity of marijuana that was
25 seized?

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1 **A.** It does in multiple -- multiple different packages,
2 multiple weights.

3 **Q.** The first item that is seized there is 140 grams net of
4 marijuana?

5 **A.** That is correct.

6 **MS. ZHENG:** Your Honor, I'm going to object to that
7 categorization. It says it's 140 grams net. That includes
8 the container that it was in. It does not give us an
9 indication of the marijuana in itself.

10 **THE COURT:** You filled this out; correct?

11 **THE WITNESS:** Yes, ma'am.

12 **THE COURT:** You can ask him about what he seized and
13 what his recollections of the amounts were.

14 **BY MR. COWHIG:**

15 **Q.** What did you seize in terms of marijuana?

16 **A.** In this case, you see here an item one, package one,
17 quantity one, green, leafy substance, marijuana, 140 grams
18 net. That is net weight. That is raw marijuana, no
19 packaging.

20 However, if you move down below it, you see package
21 one, item two, 69.1 grams gross. That is gross weight. Gross
22 weight indicates that it's the marijuana and the packaging
23 that is with it.

24 So that's the differentiation between the net and the
25 gross weights that you see there.

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1 Q. And then looking on to the second page of that, there's
2 also another weight for net?

3 A. There's an additional -- at the very bottom of the first
4 page where there's 55.4 grams gross, and then on the back page
5 there's another 8.4 grams net.

6 Q. Would this total amount be consistent with someone who is
7 simply using marijuana?

8 A. Based on my training and experience, no, sir, it would
9 not.

10 MR. COWHIG: Your Honor, I move Government Exhibit 2
11 into evidence.

12 *(Government Exhibit Number 2, offered.)*

13 MS. ZHENG: No objection.

14 THE COURT: All right. 2 will come in.

15 *(Government Exhibit Number 2, received.)*

16 BY MR. COWHIG:

17 Q. During -- or preceding your search, did you talk with
18 Ms. Rodosh who was there at the apartment?

19 A. I did very briefly, yes, sir.

20 Q. Did you ask her questions about what was found in the
21 apartment?

22 A. I did. I briefly asked her if she had any firearms or
23 any narcotics inside of the residence prior to my application
24 of the search warrant -- or applying for the search warrant,
25 and she indicated to me that she did not have any firearms or

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1 narcotics located inside of the residence.

2 Q. Did she tell you why she wouldn't have any firearms or
3 narcotics in the residence?

4 A. Yes. Because she has a small child inside the home.

5 Q. And for that reason, she would not have either firearms
6 or narcotics in there?

7 A. Yes.

8 Q. Did you then interview Mr. Whitney?

9 A. The following day, I went to the North Las Vegas
10 Community Correctional Center with Detective Cook, and we
11 conducted an interview with Mr. Whitney.

12 Q. Was that interview recorded?

13 A. Yes, sir, it was.

14 Q. Was a transcript prepared?

15 A. Yes, sir, it was.

16 Q. Is Government 18 a transcript of that recording?

17 A. Yes, sir, it is.

18 Q. Have you reviewed that for accuracy?

19 A. I have.

20 Q. And is it accurate?

21 A. Yes. There are a few minor grammatical errors, but it is
22 accurate.

23 Q. At the outset of the interview, did you advise
24 Mr. Whitney of his rights under Miranda?

25 A. Yes, sir, I did.

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1 Q. And did he indicate that he understood those rights?

2 A. Indicated he understood and he agreed to speak with me.

3 Q. Did you ask him about the firearm at the beginning of the
4 interview?

5 A. I did.

6 Q. What did he tell you?

7 A. He told me he had no knowledge of the firearm and that
8 his fingerprints and DNA would not be located on it.

9 Q. Would not be found on it?

10 A. Yes.

11 Q. Did you ask him about the marijuana?

12 A. I did.

13 Q. What did he say about the marijuana?

14 A. Initially he stated he knew nothing of it.

15 Q. Could you walk the Court through the course of that
16 interview.

17 A. The interview was a little bit more than an hour and a
18 half in length, and over the course of the interview
19 Mr. Whitney changed his story a few different times, initially
20 indicating that he had no knowledge of the items located
21 inside the apartment. Then we went into a portion of the
22 interview where we discussed his history and his upbringing,
23 and ultimately, over the course of the interview, he indicated
24 that he didn't want Ms. Rodosh to be implicated in anything
25 that was located inside the apartment.

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1 I asked him on numerous occasions to take
2 accountability for only those things that he was responsible
3 for, for nothing else. Ultimately, he tells me that he
4 reverted back to what he's known to do his entire life and
5 that was sell drugs. And then he explained that beginning at
6 age 9 he began by selling a small quantity of marijuana, and
7 then later ultimately sold harder drugs. He admitted to
8 selling cocaine, which is what he was on probation for at the
9 time of his arrest that day. And when we came back to the
10 firearm, he indicated that he knew that the firearm was there,
11 he knew that the firearm was there with the money. He
12 indicated that his DNA would be on the firearm. He described
13 the caliber of the firearm and the color of the firearm. And
14 he also described to me that the marijuana would be located
15 next to the TV, which is where it was located, directly next
16 to the TV inside of the clothes hamper.

17 Q. And why did you ask him these questions about where
18 things were or the characteristics of the firearm?

19 **A.** Because, in my training and experience, individuals would
20 oftentimes try to take charges for other people to help them
21 avoid in getting prosecuted, but I asked him specific
22 questions that only individuals who are involved in possessing
23 or handling those items would know exactly where those items
24 were located.

25 Q. And Mr. Whitney, I think you already told the Court, was

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1 gone by the time you executed your search warrant?

2 **A.** Yes. Once the residence was frozen and the application
3 was being made for the service of the search warrant,
4 Detective Cook had transported -- or I believe it was parole
5 and probation, when they left, they loaded him into their
6 vehicle and they transported him to North Las Vegas for
7 Detective Cook so that he could complete that booking.
8 Mr. Whitney was not present during the service of the search
9 warrant.

10 **Q.** So he did not see any of the search that you described
11 here for the Court?

12 **A.** No, sir, he did not.

13 **Q.** During a significant portion of the interview,
14 Mr. Whitney is talking about whether someone else would take
15 responsibility for the gun and the marijuana. Could you
16 explain that a little bit to the Court?

17 **A.** Could you elaborate slightly further?

18 **Q.** There's a discussion during the interview where
19 Mr. Whitney is talking about whether Ms. Rodosh is the one who
20 possesses the firearm and the marijuana.

21 **A.** Yes. There's extensive conversation about him not
22 wanting her to be involved in any way, that she's not involved
23 in that, that she's a great mother, and she takes great care
24 of her child, that she was not raised -- she's not involved in
25 any of that. We have extensive conversation about his

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1 childhood and how he was brought up around narcotics dealing
2 and the life that he had lived growing up. And through that
3 he said he could never ask her to try to take responsibility
4 for something that he was involved in.

5 Q. Did you write up a final report, a declaration of arrest
6 report in this incident?

7 A. Yes, sir, I did.

8 Q. Would you look at Government Exhibit Number 1 for
9 identification, please.

10 A. That is my declaration of arrest for Stephon Whitney in
11 reference to this incident.

12 Q. Is that a fair and accurate representation of this
13 incident and the investigation?

14 A. Yes, sir, it is.

15 MR. COWHIG: Your Honor, I'd move Government
16 Exhibit 1 into evidence.

17 (Government Exhibit Number 1, offered.)

18 MS. ZHENG: No objection, Your Honor.

19 THE COURT: All right. 1 will come in.

20 (Government Exhibit Number 1, received.)

21 THE COURT: I don't think you moved in 18. Did you
22 intend to move in 18?

23 MR. COWHIG: Yes, Your Honor. I'm sorry.

24 (Government Exhibit Number 18, received.)

25 THE COURT: So 18's the transcript. Any objections

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1 to that one?

2 **MS. ZHENG:** Likewise, no objection.

3 **THE COURT:** All right. 18 will come in.

4 *(Government Exhibit Number 18, received.)*

5 **BY MR. COWHIG:**

6 Q. With regard to the drugs and the drug paraphernalia and
7 the firearm and the magazines and the ammunition, were these
8 all essentially located in the same part of that apartment?

9 **A.** Yes. They were all located either within or immediately
10 outside of what we've been referring to as the master bedroom.

11 Q. And in your experience as a law enforcement officer, is
12 it common to see firearms and drugs that are being sold
13 together in the same place?

14 **A.** Yes. Individuals who engage in narcotics sales
15 oftentimes possess firearms to protect themselves for fear of
16 being robbed during narcotics transactions.

17 **MR. COWHIG:** No further questions, Your Honor.

18 **THE COURT:** Thank you.

19 Cross?

20 **THE WITNESS:** Before we begin, do we have a bottle of
21 water or something?

22 **COURTROOM ADMINISTRATOR:** I'll go grab one.

23 **THE COURT:** Danielle will go grab you one.

24 **THE WITNESS:** Thank you so much, Your Honor.

25 Thank you so much, ma'am. Thank you.

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CROSS-EXAMINATION

BY MS. ZHENG:

Q. Good morning, Detective Costello. I'm going to try to track as close as I can to the testimony that was previously given.

So let's go back and start with the August 28th incident. Were you involved in that incident?

A. Yes, I was.

Q. You were physically present during the stop of the party bus?

A. Yes. However, in a covert manner. I remained inside my vehicle down the street watching the traffic stop occur and the crowd beginning to grow.

Q. And with respect to that incident, there were allegedly firearms that were found within the bus; correct?

A. Yes, ma'am. There were three firearms located inside the bus.

Q. None of those firearms were physically on Mr. Whitney?

A. No. They physically remained on the bus when all the subjects exited the bus.

Q. And, ultimately, there's no determination that Mr. Whitney possessed any of those guns that were associated with that bus?

A. A DNA comparison was requested, and his DNA was not definitively located on any of those three firearms.

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1 Q. And, ultimately, in the course of that investigation he
2 was identified, and then it was a requested follow-up which is
3 what led to the September 2nd home inspection?

4 A. Yes. I contacted parole and probation after I learned
5 that he had provided a false name that night.

6 Q. And so, in essence, the home inspection on September
7 7th -- I'm sorry, September 2nd was an assist to your
8 investigation?

9 A. It was -- it was two part. So -- I don't want to mess up
10 his name. I believe it was Officer Vargas said that he had
11 just taken over as being the supervising officer for
12 Mr. Whitney. He indicated that he needed to go out and do his
13 duty and conduct a home inspection, and he asked if I would --
14 if I wanted to do my warrant, if I would just accompany him so
15 that we could handle two things at one time.

16 Q. Okay. And at that point had you already received the
17 warrant for the buccal swab?

18 A. I don't recall.

19 Q. During the home inspection, you had testified that you
20 did not go into the house first?

21 A. Initially I did not. It was only parole and probation
22 personnel.

23 Q. Okay. And of the parole and probation personnel, was it
24 just Officer Vargas or were there other officers present with
25 him also?

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1 **A.** He had other officers with him.

2 **Q.** Do you recall how many officers there were?

3 **A.** There was more than one. I -- I can't testify to exact
4 number.

5 **Q.** And as to the entry into the house and any contact that
6 they made with either Mr. Whitney or anyone that lived in the
7 house, you were not privy to it?

8 **A.** No, I was not.

9 **Q.** So you would have no information as to whether or not, if
10 any of the items were found, if anybody in the house were told
11 that they were going to be charged with a crime or otherwise?

12 **A.** I have no knowledge of their conversation with those
13 individuals.

14 **Q.** Okay. As to the two magazines that were found, were you
15 ever shown specifically what location the two magazines came
16 from?

17 **A.** Yes. He pointed to the closet where he saw them sitting
18 on the top shelf.

19 **Q.** Do you recall, in regards to the master bedroom, there
20 was actually two closet areas in the house?

21 **A.** You're saying there's two separate closets within the
22 master bedroom?

23 **Q.** There's two separate spaces.

24 **A.** Okay.

25 **Q.** Do you recall that?

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1 **A.** Not off the top of my head, no.

2 **Q.** Okay. And you wouldn't be able to testify as to whether
3 or not it was in his closet specifically or her closet?

4 **A.** There's other photographs of the closets. I don't have
5 them here before me. I just know that, when we were standing
6 and looking at the closet, he pointed and said, Hey, I found
7 those magazines right here on the top shelf.

8 **Q.** At the time that any of the evidence was found, in this
9 case as it appears before us, you have no direct evidence that
10 Mr. Whitney was, in fact, engaged in the sale of marijuana?

11 **A.** Could you repeat the question?

12 **Q.** There's no direct evidence that he has engaged in the
13 sale of marijuana?

14 **MR. COWHIG:** Objection, Your Honor. I think that's
15 calling for a legal characterization.

16 **THE COURT:** Sustained. Rephrase.

17 **BY MS. ZHENG:**

18 **Q.** In regards to the marijuana that was found, this was not
19 specifically an investigation into marijuana sales; correct?

20 **A.** It was not.

21 **Q.** There is no indication that -- or surveillance that
22 anyone had come to the home and purchased marijuana?

23 **A.** I have no evidence of that.

24 **Q.** There's no evidence that there was any hand-to-hand sale
25 that was conducted that you know of?

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1 **A.** I have no evidence of that.

2 **Q.** You initially booked him for marijuana -- for the
3 possession of marijuana also?

4 **A.** When -- so his initial arrest was for the probation
5 violation and the false info or obstructing, and that was done
6 by North Las Vegas Detective Cook. I then follow up and later
7 rebooked him for the ex-felon in possession of a firearm and
8 the possession with intent to sell marijuana.

9 **Q.** And are you aware if he's ever been charged for the
10 marijuana, for the possession with intent to sell?

11 **A.** I know what I arrested on. I don't know if the district
12 attorney chose to file those charges or not.

13 **Q.** Okay. Do you know that there was a state case filed
14 against Mr. Whitney?

15 **A.** I made the initial arrest. Yes, I'm aware of that.

16 **Q.** Okay.

17 **A.** As far as the DA's charging, I don't know what the -- the
18 charging was.

19 **Q.** Okay. So you don't know that the marijuana charges were
20 denied as it pertains to him?

21 **A.** I learned that just now, ma'am.

22 **Q.** Okay. And in regards to the items that was found -- I'm
23 now tracking into the exhibits that were provided. When they
24 came in, I guess -- you called for a telephonic search
25 warrant; correct?

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1 **A.** I did, yes.

2 **Q.** And when the search warrant is executed, are you
3 specifically the person that is executing? So in the
4 Government's Exhibit 3.

5 **A.** The picture of the bed frame?

6 **Q.** Correct.

7 **A.** Yes, ma'am.

8 **Q.** Were you involved in removing the mattress --

9 **A.** Yes, ma'am, I was.

10 **Q.** -- on the bed?

11 And at the time of -- where the bed frame was, was it
12 pushed up against the wall, or it wasn't free-floating in the
13 room, was it?

14 **A.** No. What you're seeing here is we've already begun the
15 search, and so things had been moved at this point as we began
16 searching. So, again, there's photographs that are taken
17 before the search began. That is it our standard protocol.
18 We take pre-search warrant photos. We take post-search
19 warrant photographs to show the condition of the residence
20 when we leave. And so in the initial you would see that the
21 bed was more off the wall and that there was a nightstand over
22 there next to the bed.

23 **Q.** On both sides of the bed there was a nightstand?

24 **A.** I believe so, yes. I know for certain there was on
25 Mr. Whitney's side because of the -- the pill bottles and such

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1 that were located right there.

2 Q. And since in these pictures they were already moved, was
3 the bed initially -- prior to the execution of the search
4 warrant, was the bed pushed up against the wall, do you
5 recall?

6 A. No, ma'am, it was not.

7 I'm sorry. When you say pushed up against the wall,
8 do you know like we see it here where it's all the way up to
9 the wall to the right and all the way back, or are you talking
10 about the headboard being against the wall?

11 Q. The headboard being against the wall, being back against
12 the wall.

13 A. The headboard was against the wall, yes, ma'am.

14 Q. Okay.

15 A. I'm sorry. I apologize. I thought you were referring to
16 where you see in Government's Exhibit 3 where it's pushed all
17 the way to the right --

18 Q. Into the corner --

19 A. -- up against the wall --

20 *(Reporter instruction.)*

21 **MS. ZHENG:** I'm sorry.

22 **BY MS. ZHENG:**

23 Q. Your testimony is that the bed was not pushed up against
24 the corner of the room --

25 A. It was --

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1 Q. -- correct?

2 A. -- not pushed into the corner, but the headboard was
3 against the wall.

4 Q. Okay. And moving to Government's Exhibit 4, there is a
5 ledge against the headboard wherein the zipped compartment
6 sits; correct?

7 A. I'm sorry? I'm not understanding your question.

8 Q. So where the headboard is, there's a ledge that comes
9 out, and the zippered compartment sits within that ledge area
10 of the headboard?

11 A. Yes. So there's -- the headboard -- you see the top
12 board there. It's maybe three to -- three and a half inches,
13 4 inches wide. And then there's that fabric that's affixed to
14 it that is away from the front portion of the headboard so it
15 leaves that -- that cavity that's in there, and that's
16 accessible with a zipper.

17 Q. Sure.

18 But that zipped portion is nestled within the cavity
19 of the headboard is your testimony; correct?

20 A. It's inside of the headboard, yes.

21 Q. And when you walked into the room, however that headboard
22 was pushed up against the wall?

23 A. Yes, ma'am, it was.

24 Q. And so in order then to access the gun or the money, the
25 bed would have to be slightly pulled away from the wall in

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1 order to access the compartment?

2 **A.** That is correct.

3 Q. And within that compartment you found the gun, a
4 magazine. Was the gun loaded? The magazine was separate from
5 the gun; correct?

6 **A.** There was a magazine in the firearm, which is depicted in
7 Government Exhibit Number 6. You see there that there's a
8 firearm in the magazine. And then there was a separate
9 magazine that was loaded as well that I believe you see in
10 Government's Exhibit -- yes, Government's Exhibit 7.

11 Q. And then, along with those two items, you found the bank
12 sleeve of cash?

13 **A.** Yes. Government's Exhibit 8, the paper envelope with the
14 money in it, yes, ma'am.

15 Q. Do you remember laying out the cash and taking inventory
16 for it?

17 **A.** Yes, ma'am. We took a photograph of it, and then we
18 counted it to be impounded.

19 Q. And predominantly the monies were large denominations;
20 correct?

21 **A.** I believe there were multiple hundred-dollar bills in
22 there.

23 Q. Okay.

24 **A.** I'd have to refer to my money accounting form which
25 breaks it down specifically.

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1 Q. And the monies were seized in connection with the
2 marijuana that were found -- that was found presumably to be
3 proceeds of marijuana sales; correct?

4 A. Yes, ma'am.

5 Q. Were you aware ultimately that in a state forfeiture
6 proceeding the entirety of those proceeds were returned to
7 Mr. Whitney and Ms. Rodosh?

8 A. I was not aware of a state forfeiture proceeding.

9 Q. Okay. And so you -- in the course of the search warrant,
10 you were neither looking for documentation that would verify
11 the source of funds for the monies?

12 A. The search warrant was for the firearm, firearms
13 paraphernalia, and the DNA of Mr. Whitney.

14 Q. Okay. With respect to marijuana, Government's Exhibit 9
15 to 13, you testified that all of that was found within the
16 laundry hamper?

17 A. The jars and the plastic bag, yes.

18 Q. Okay. So, in essence, the bulk of the marijuana
19 itself --

20 A. Was located inside --

21 Q. -- was all within the laundry hamper?

22 A. Yes, ma'am.

23 Q. And then --

24 **THE COURT:** Wait. Was the bulk or all of it?

25 **THE WITNESS:** There was one additional small plastic

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1 vial that was, I believe, on the bathroom counter. Like a
2 small little snap-top bottle, and that was listed on the
3 property report. I think it had maybe 8 grams or something in
4 it. It was near the end of the property report.

5 **THE COURT:** Thank you.

6 **BY MS. ZHENG:**

7 Q. And you're referring to Government's Exhibit 2 wherein
8 you're talking about package one, item four?

9 A. One moment. Let me get there.

10 Yes. Package one, item four: A green, leafy
11 substance, marijuana, 8.4 grams net in gray bottle.

12 Q. But for the 8.4 grams, everything was found in the
13 laundry hamper?

14 A. Yes, ma'am.

15 Q. And you testified that there were other items that were
16 found by the laundry area; correct?

17 A. Yes, ma'am.

18 Q. And in this case it was the digital scale, and it was in
19 a sandwich bag box; correct?

20 A. Yes, ma'am.

21 Q. And we are talking about the fact that these are, like,
22 lunch bags, sandwich bags with the roll-up, not with the zip
23 top or the Ziploc top?

24 A. Yes, ma'am.

25 Q. Okay. Other than that one container for 8.4 grams, all

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1 of the marijuana was packaged in bulk?

2 **A.** Yes, ma'am.

3 Q. In -- anywhere in the house, did you find any small bags
4 of marijuana that were packaged for sale?

5 **A.** No, I did not find any small bags.

6 Am I making the correct assumption, when you're
7 talking about, like, the -- what they sometimes refer to as
8 jewelry bags, like the small, square --

9 Q. Correct.

10 **A.** Okay. So, no, never did I find any small bags that would
11 be consistent with either personal-use consumption or with the
12 packaging in that manner.

13 Q. And then, also, in the laundry area, the ammunition that
14 was found that was contained in Government's Exhibit 16 and
15 17, that was also found near and around the laundry area?

16 **A.** Yes, ma'am. It was found on the same shelf as the scale
17 and the baggies.

18 Q. Okay.

19 **MS. ZHENG:** Court's indulgence, please.

20 **BY MS. ZHENG:**

21 Q. On the day of the search, did you interview Ms. Rodosh?

22 **A.** Formally, no. It was a brief interaction. She said she
23 needed to leave to attend to her son. I don't remember. She
24 had to take him somewhere or she had to pick him up from
25 somewhere, but she left.

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1 Q. Okay. Did you indicate to her that you would need to
2 speak to her later in regards to the investigation?

3 A. At that time I did not because I did not know what I was
4 going to find inside the residence. I told her I would
5 contact her again when the search warrant was over so that I
6 could turn the residence back over to her so we didn't have to
7 board up the door. We wanted to make sure the residence was
8 secure.

9 Q. Okay. And you did not testify at the state revocation
10 proceedings; correct?

11 A. No.

12 Q. You were... you would otherwise be unaware that
13 Ms. Rodosh had called Officer Vargas, Mr. Whitney's probation
14 officer --

15 MR. COWHIG: Your Honor, I'm going to object at this
16 point. I think counsel's essentially testifying.

17 THE COURT: Please rephrase.

18 BY MS. ZHENG:

19 Q. Were you aware that Ms. Rodosh had contacted
20 Officer Vargas?

21 A. I have no knowledge of their interaction.

22 Q. Okay. Were you aware as to whether or not any charges
23 were filed against Ms. Rodosh in relation to what was found in
24 the house?

25 A. I only know what charges I filed. As far as my case, my

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1 charges were solely for Mr. Whitney. I don't know if anyone
2 else followed up or filed any charges against Ms. Rodosh.

3 Q. The day after the search warrant was executed, you went
4 to North Las Vegas Jail to interview Mr. Whitney?

5 A. That is correct.

6 Q. And you had testified earlier that much of his
7 conversation with you is that he absolutely did not want her
8 implicated; correct?

9 A. Yes.

10 Q. And in the course of the interview, it spanned an hour
11 and a half?

12 A. A little bit longer than that, yes, ma'am.

13 Q. About.

14 And the transcribed document showed that it was
15 approximately 88 pages?

16 A. Yes.

17 Q. Initially, in the course of the interview, there were
18 several mentions that were made by you or Detective Cook,
19 who's also present for the interview?

20 A. Correct, he was present.

21 Q. That you were also investigating Ms. Rodosh, and the
22 likelihood was that she would be charged with the items in the
23 house?

24 A. Is that a question? I apologize.

25 Q. Do you remember that? Did that happen?

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1 **A.** We discussed that she could potentially be arrested or
2 charged, yes.

3 **Q.** And, in fact, that was how the interview started;
4 correct?

5 **A.** I believe it started with me saying I don't want you to
6 take credit for anything that you're not involved in; however,
7 I have to do my due diligence and I have to speak to all
8 parties, and I'm speaking to you today.

9 **Q.** And you did tell him that there was a good possibility
10 coming down the line that there would be charges for both
11 Mr. Whitney and her?

12 **A.** I did indicate that was a possibility, yes.

13 **Q.** Okay. And then that continues.

14 And then later on, in the next breath, you tell him
15 that she's looking at charges coming down against her for
16 child abuse?

17 **A.** That was possible, yes.

18 **Q.** And then, immediately at the start of the interview you
19 had asked him about the marijuana, and he had -- he was
20 actually unclear as to what was present in the house; isn't
21 that correct?

22 **A.** I'd have to refer to the exact transcript. Again, it
23 was --

24 **Q.** So if it helps --

25 **A.** -- a lengthy interview.

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1 Q. If it helps to refresh your recollection, I'm referring
2 to what's on pages 7 and 8.

3 A. You say 7 and 8?

4 Q. Um-hum.

5 A. Where are you starting at here on 7, ma'am?

6 Q. On the bottom of 7.

7 A. On the bottom of 7... we're talking about selling
8 cocaine?

9 Q. No -- yes. Well, he was talking about a prior felony,
10 but then it starts at the bottom of 7, rolling into page 8.

11 A. So we talk about his past with him --

12 Q. I just need you to refresh your recollection --

13 A. Oh.

14 Q. -- if you want to just look at it.

15 So have you had a chance to review pages 7 and 8?

16 A. I'm finishing just now, ma'am. Yes, I have.

17 Q. So initially he was not very clear as to whether or not
18 there was shake in the bag or there was actual whole-leaf
19 marijuana. And his initial claim was that, if there was
20 marijuana in the house, it was marijuana that she smoked;
21 correct?

22 A. He was ambiguous about the marijuana and indicated that
23 she smoked marijuana, yes.

24 Q. And then you testified, in fact, that a large portion of
25 the interview you go into his criminal history, his prior

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1 criminal history, his upbringing.

2 **A.** Yes, we discussed that.

3 Q. And then, midway into the interview there was another
4 inference that, as a result of her connection with him, that
5 Ms. Rodosh was now caught up in this investigation; is that
6 correct?

7 **A.** Again, from the very beginning there was no hiding the
8 fact that she was potentially being investigated for the
9 marijuana charges and the potential child abuse charges as
10 well.

11 Q. And, again, his response to you was he didn't want her
12 implicated, and his answers to you were: So you're basically
13 saying, unless I own up to all that shit -- and testify
14 multiple times that she was a good girl, she didn't need
15 that -- meaning she didn't need to be charged -- she don't
16 need that, man. And then he kept asking you whether or not,
17 if he claimed responsibility for it, it would prevent her from
18 being charged; correct?

19 **A.** He did ask that. However, when I answered, I told him I
20 don't want her side of the story. I need his side of the
21 story. And I asked him to only testify and give me comment
22 regarding his involvement, not hers. At no time did I promise
23 him that, by him taking this charge or accepting guilt, would
24 she be not implicated in any way.

25 Q. Sure. But your answer and the implication was, unless

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1 there's some type of mitigating circumstance or some
2 additional information that I've learned through the course of
3 my investigation, then those facts have to be presented in
4 court. And his response was: And you mean that as in what,
5 to me owning up to everything?

6 **A.** I don't know what --

7 **THE COURT:** I'm sorry. What's the --
8 *(Simultaneous crosstalk.)*

9 **MR. COWHIG:** -- where we are in the transcript?

10 **MS. ZHENG:** Oh. I'm sorry. We're on page 49.

11 **THE COURT:** And -- and is there a question?

12 **BY MS. ZHENG:**

13 Q. Was that the implication, that there was -- if mitigating
14 circumstances were presented to you that she was not the owner
15 of those items, then that would be the way to see her out of
16 the case?

17 **A.** My indication was to him that the facts are the facts. I
18 have to present the facts. This is what I know right now.
19 I'm here to get your side of the facts. He continually asked
20 me, if he would -- if he would take the charge, if she'd been
21 left alone. I indicated to him at no time that she would ever
22 receive any type of immunity or not be charged. He repeatedly
23 asked. I repeatedly refused to give him that answer because
24 that's ultimately not how the investigation goes. I'm there
25 to discuss his involvement in the investigation that day, not

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1 Ms. Rodosh's involvement.

2 Q. Sure. But when he did accept responsibility to it, did
3 he continue to remain ambiguous as to the details of where the
4 items were?

5 **A.** No. He was a very -- in fact, he was detailed. It's
6 located at this location. It's by this. It's located here.
7 There was --

8 Q. But he answered -- did it seem as if he answered all of
9 your questions with a question?

10 **A.** No. He and I had the conversation multiple times
11 throughout the hour and I believe 42-minute conversation. In
12 the end, when he ultimately accepted guilt, I told him I had
13 some very pointed questions I had to ask regarding specific
14 details, and he answered them.

15 Q. What's saying I think it was this or I think it was that
16 or I don't know where specifically -- so I'm referring to --

17 **A.** May I follow along in the transcript so I see what you're
18 speaking to?

19 Q. Sure.

20 **A.** Where are you at, ma'am?

21 Q. I'm on page 66.

22 **A.** 66. Okay.

23 Q. So you asked him what the gun looks like; he wasn't sure.
24 The question was just generically. He says: I think it was
25 all black. He wasn't even specifically sure as to the

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1 difference between a revolver and a semiautomatic. His guess
2 was that a revolver has the spinny thing --

3 **MR. COWHIG:** Objection to the characterization as a
4 guess.

5 **MS. ZHENG:** I mean, they are, in fact, written with a
6 question attached to it.

7 **THE COURT:** Overruled. You can continue.

8 **BY MS. ZHENG:**

9 Q. He continues to say: I think it was all black, though.
10 Well, the majority of it black.

11 And then, when we moved on to the marijuana, he
12 believed that the marijuana predominantly was in the bathroom.
13 You had to ask him where else it was. Then he said it was by
14 the TV. He couldn't tell you how it was packaged. I'm now
15 rolling on to page 67.

16 **THE COURT:** And I hope there's a question in there
17 somewhere, Counsel.

18 **BY MS. ZHENG:**

19 Q. You're directing -- so he was not specific as to the
20 details, the location of the items found that were considered
21 contraband, correct, in this exchange?

22 **A.** Not correct. During the totality of the -- this line of
23 questioning, he identified it as being a semiautomatic, not a
24 revolver. He identified it as being black. He told me that
25 it was a nine millimeter; he knew that. He discussed where

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1 the marijuana would be by the TV. He then mentioned that it
2 was in the jar or, like, bulk package. He had very
3 specific -- and, again, as he was trying to answer the
4 questions, I would come back with another clarifying question
5 to make sure -- again, my -- my attempt is not to get this man
6 to take a charge that he's not responsible for. I'm looking
7 for clarifying questions to make sure that he does have that
8 knowledge of these items before I charge him with them.

9 Does that make sense, Counselor?

10 Q. I understand. Yes, what you're saying makes sense.

11 But in terms of the characterization of his responses
12 to you, predominantly they're categorized in this interview as
13 he is responding to your question with the question, and there
14 are a lot of I don't really knows. But some of this
15 information was given to him prior to us getting I'm going to
16 guess probably an hour into the interview at this point.

17 I mean, he was previously told what items were found
18 in the house. So he would have those details as a result of
19 what was told to him earlier; correct?

20 A. Who would have told him what items were found?

21 Q. In the course of the interview it was mentioned.

22 A. I mentioned that we'd found a firearm, and I mentioned
23 that we'd found narcotics. But never did I tell him that the
24 gun would be hidden in the headboard. Never did I tell him,
25 that I recall, that the gun -- or that the marijuana was in

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1 the basket. He even went so far as to say it's by the TV.
2 And I said, Well, which TV? Because there was multiple TVs in
3 the residence. He said, "The TV in our room," which is
4 exactly where it was found next to.

5 **MS. ZHENG:** Court's indulgence, please.

6 **BY MS. ZHENG:**

7 Q. Detective Costello, do you remember or recall showing
8 Mr. Whitney the search warrant return at any point prior to
9 the interview?

10 **A.** No. What I had for Mr. Whitney for the search warrant
11 return is I was serving a DNA buccal swab on him that day. So
12 prior to the interview beginning at the very beginning, if you
13 listen to it, you can hear me opening the package and such. I
14 am fulfilling the second half of the search warrant, which was
15 the collection of the DNA swab. So when he was presented a
16 search warrant and a return, he was given the -- the portion
17 of the return and the warrant regarding his DNA collection,
18 not the -- not the warrant in the return that were left at the
19 apartment or the house, if that makes sense.

20 Q. You don't recall whether or not if preinterview he had
21 seen a copy of the search warrant return from the house?

22 **A.** He would have no way to see it because he's been
23 incarcerated. The search warrant return wasn't generated
24 until after he was in custody in North Las Vegas. The return
25 that I gave him was the warrant and the return for the

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1 collection of his DNA. He was photographed holding that
2 return just showing that I collected two buccal swabs from his
3 mouth.

4 **MS. ZHENG:** Court's indulgence.

5 I have no further questions, Your Honor.

6 **THE COURT:** Thank you.

7 Rebuttal?

8 **MR. COWHIG:** Very briefly, Your Honor.

9 **REDIRECT EXAMINATION**

10 **BY MR. COWHIG:**

11 Q. Detective Costello, with regard to the search warrant
12 return for the search of the residence, did that search
13 warrant return say where things were found or just what was
14 seized?

15 **A.** Just the items seized.

16 Q. So it wouldn't have answered the question as to where the
17 marijuana was, where the gun was?

18 **A.** No. We just list an itemized list: Firearm, ammunition,
19 money, marijuana.

20 Q. And with regard to accessing the firearm in the
21 headboard, how difficult would it be for a person to get into
22 that headboard and get the firearm out if they knew it was
23 there?

24 **MS. ZHENG:** Your Honor, I'm going to object to that
25 as a cause of speculation. He neither lived in the house nor

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1 was he there to move the bed.

2 **THE COURT:** And you actually asked that question
3 during your direct.

4 **MR. COWHIG:** Certainly, Your Honor.

5 **BY MR. COWHIG:**

6 Q. And then, the false name that Mr. Whitney provided on
7 August 28th, was that also a violation of his parole and
8 probation conditions?

9 **A.** He has a general condition -- I don't want to speak to
10 all the terms of his probation agreement, but a general
11 condition of parole and probation is to cooperate with law
12 enforcement and not commit new crimes. And in doing so, he
13 violated that, and that's why his officer initiated the -- the
14 initial violation. The secondary violation was what we
15 discovered during the service of the search warrant.

16 **MR. COWHIG:** Thank you. No further questions,
17 Your Honor.

18 **THE COURT:** Anything else?

19 **MS. ZHENG:** Just very briefly.

20 **REXCROSS-EXAMINATION**

21 **BY MS. ZHENG:**

22 Q. Just to follow up on the line of question that I had
23 asked in regards to direct evidence of drug sales --

24 **MR. COWHIG:** Objection, Your Honor. Beyond the
25 scope.

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1 **THE COURT:** Let me hear the question, and then I'll
2 rule on it.

3 **BY MS. ZHENG:**

4 Q. You didn't find any owe sheets in the house during the
5 execution of the search warrant?

6 **THE COURT:** I'll just allow it. Go ahead.

7 **THE WITNESS:** No, ma'am, I did not.

8 **MS. ZHENG:** Okay. I'll just leave it at that. Thank
9 you.

10 **THE COURT:** Thank you.

11 **MR. COWHIG:** Nothing further, Your Honor. Thank you.

12 **THE COURT:** Thank you.

13 May I excuse this witness?

14 **MR. COWHIG:** Please, Your Honor.

15 **MS. ZHENG:** Yes, please.

16 **THE COURT:** All right. You can step down. Thank
17 you, sir.

18 **THE WITNESS:** Thank you, Your Honor.

19 **THE COURT:** Any other witnesses or evidence,
20 Mr. Cowhig?

21 **MR. COWHIG:** No, Your Honor. Out of an abundance of
22 caution, though, I'd like to clarify, in case at some point in
23 the filings I identified the two magazines in the closet as
24 fitting the Canik, I think it's obvious from the testimony
25 they did not. I was searching through my filings to see if I

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1 had made that representation because I have some recollection
2 of writing that. If I did, that is not accurate. The
3 testimony here --

4 **THE COURT:** So the magazines found in the closet did
5 not fit the gun?

6 **MR. COWHIG:** Yes, Your Honor.

7 **THE COURT:** All right. Ms. Zheng, anything in
8 response? Did you want to put on any evidence?

9 **MS. ZHENG:** No, Your Honor. I think with the
10 remainder of it I'll just argue.

11 **THE COURT:** All right. So here's what we're going to
12 do. It's now 12:20. I'm going to let each of you argue the
13 effect of the evidence that we've just seen today on the
14 four-level enhancement. So I will start with Mr. Cowhig. But
15 then we'll -- we'll have to break after that, and we'll pick
16 this back up at a continued hearing. So -- but I want to make
17 sure that we close out all the evidence and argument on this
18 point so that I don't have to try to go back and -- and pick
19 up where we left off.

20 So, Mr. Cowhig, argument in support of the
21 enhancement and in response to any of the further objections
22 that were raised to the PSR with respect to --

23 **MR. COWHIG:** This point.

24 **THE COURT:** -- this point.

25 **MR. COWHIG:** Yes, Your Honor. And I believe we've

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1 covered most of the points that I would make in our briefings.
2 One that I addressed tangentially, not directly, is that the
3 correct standard is preponderance of the evidence, not clear
4 and convincing evidence here. Under the case law applicable,
5 we don't really get into the question of whether a higher
6 burden is needed until you get above four -- I'm -- above four
7 levels, five or greater. Even if, however, the higher
8 standard of proof were applicable, the evidence here meets
9 that standard of proof.

10 Just summarizing very quickly the evidence that shows
11 that Mr. Whitney was involved in the sale of marijuana during
12 the time frame and the firearm was connected with that, all of
13 these items we've been discussing have been found inside a
14 very small apartment. The application of the enhancement does
15 not depend upon a witness or a video or some other direct
16 evidence showing that he was engaged in marijuana, simply
17 evidence to show that he was engaged in the trafficking of
18 marijuana and that the firearm was found in close connection
19 with that.

20 The law recognizes and the experience of law
21 enforcement recognizes that persons who sell illicit
22 substances very often do so with a firearm available to them.
23 They have to do so because they have to protect themselves
24 both from theft of the illicit substances and theft of the
25 money because they obviously cannot have recourse to law

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1 enforcement if that were to happen to them.

2 Here the marijuana was found in bulk. It was not
3 small -- small items or small amounts that were purchased for
4 one individual's use, but it was in bulk in the apartment.

5 Detective Costello did not find prepackaged, multiple
6 small amounts for sale. That's not an indication that there
7 wasn't distribution of marijuana going on. It simply means
8 that Mr. Whitney and/or Ms. Rodosh were not at that point
9 ready to walk out the door and sell those small amounts. The
10 bulk amounts that were there were packaged the way that
11 illicit marijuana is packaged, not the way that marijuana that
12 is purchased from a dispensary for individual use is packaged.
13 There were no wrappings, no containers, no -- nothing to
14 indicate that this marijuana had been purchased from a
15 dispensary for individual use.

16 As to the argument that it was illicitly purchased
17 for individual use, the quantity of marijuana is simply too
18 large for that. Mr. Whitney, in his interview with
19 Detective Costello and in the testimony that was presented by
20 defense as part of their filings in the revocation proceedings
21 before the state indicated that they were going through
22 financial hard times, they were having trouble making ends
23 meet. The claim was that the cash that was found in the
24 headboard was cash that they had recently received and backed
25 up unemployment benefits. All of that evidence would tend to

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1 indicate that Ms. Rodosh and Mr. Whitney did not have a lot of
2 available income for buying a large quantity of marijuana
3 simply for personal use.

4 It's possible Ms. Rodosh was using marijuana
5 personally, but that does not eliminate the evidence that
6 shows that there was sale of marijuana going on or
7 distribution of marijuana going on.

8 Defense argues in their brief about the firearm
9 needing to be essentially used in the course of a marijuana
10 distribution or distribution of the drugs. That's simply not
11 what the case law indicates. The case law indicates clearly
12 that the possession of the firearm simply would need to
13 support that illicit activity, and here it clearly did support
14 that illicit activity. The gun, the ammunition, the magazines
15 were all stored in the same general area where the marijuana
16 was stored. The ammunition was stored on the shelf next to
17 the baggies for breaking down those large quantities of
18 marijuana with the scale.

19 Defense, in their filings, makes a representation
20 that that scale was used for marijuana but it was used to
21 portion out essentially a portion for consumption. I think
22 that's such common sense that that's not a necessary step in
23 the process of consuming marijuana that that argument should
24 be given no weight.

25 Your Honor, I believe that we've shown both by a

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1 preponderance of the evidence and by clear and convincing
2 evidence that Mr. Whitney was involved in the distribution of
3 marijuana. And that that distribution of marijuana is
4 connected with his possession of the firearm and the
5 four-level enhancement should apply.

6 **THE COURT:** Response?

7 **MS. ZHENG:** Your Honor, I believe that the Court
8 should apply the higher clear-and-convincing-evidence
9 standard. It's a four-level increase. It just reaches the
10 threshold. However, this four-level increase represents such
11 a significant jump in Mr. Whitney's sentence that he -- it
12 would be a 30-month distinction with where Probation and the
13 Government has him calculated. And, in essence, this
14 enhancement alone represents 43 percent of his sentence.

15 And as a result of that heightened standard or even
16 if it was a preponderance-of-evidence standard, I'm not sure
17 that we can specifically just rely on the findings of the
18 judge as to the revocation proceedings. The revocation
19 proceedings are a much lower standard than what is called for
20 here in regards to the fact that whether there were other
21 factors involved or specifically as it pertains to the gun in
22 this case, the uncharged marijuana, or otherwise, whether or
23 not his conduct the judge believed was sufficiently good
24 enough for a probationer is the standard that's applied there.

25 So that finding and the Court's finding there does

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1 not bind this Court in any way from reaching an independent
2 determination. Quite frankly, I just don't think that the
3 Government can get there. The Government's argument is very
4 much that of a predetermined conclusion. That in order to
5 support the four-level enhancement, it has to be that Stephon
6 is selling the marijuana. And quite frankly, that's not the
7 case. There is no direct evidence here that there was any
8 type of marijuana sales that was going on. In regards to the
9 fact that we have no evidence that there were hand-to-hand
10 sales. There were no evidence that any of the marijuana was
11 broken up within the house and packaged to be resold. There
12 was no owe sheets of any kind. I don't deny that the
13 marijuana is in bulk, but in a state that allows for
14 recreational use and medical use, it is not uncommon that
15 people don't buy marijuana specifically from a dispensary.
16 Just because marijuana is not purchased for -- from a
17 dispensary as it should be, that said, it doesn't mean that
18 they're not personally using. And just because it's not
19 purchased from a dispensary does not mean that the marijuana
20 was necessarily purchased in anticipation of repackage for
21 sales. We simply don't have that here.

22 On many levels, I'm sure -- later on, I know that
23 Ms. Rodosh is going to wish to speak on Mr. Whitney's behalf
24 in mitigation, but she did testify at the revocation hearing.
25 She also tried to contact Officer Vargas before the revocation

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1 hearing happened in regards to what had happened in their life
2 and what was going on with her as to the presence of the gun
3 and the marijuana in the house.

4 Her testimony simply is -- and much of this stuff is
5 all located around the laundry area --

6 **MR. COWHIG:** Your Honor, I believe defense is arguing
7 material that's not in evidence at this point.

8 **THE COURT:** This is in their sentencing materials.

9 **MS. ZHENG:** That... because most of the things were
10 in a general area, the detective testified that this is a very
11 small residence, and it's hard necessarily not to know what
12 was there. But her testimony is and the physical evidence
13 supports the fact that all of the stuff is found directly in
14 or about or related to the laundry area. And quite frankly,
15 that kind of comes down to a division of labor in the home.
16 She does the laundry; he doesn't. Whatever her intent was to
17 perhaps hide it from him, keep it from him, or keep it
18 individually hers, laundry was her way to do that. Everything
19 is either found above the dryer, in the laundry hamper for its
20 use.

21 I know Detective Costello has had a sterling record
22 of working for the state, and it's certainly not my argument
23 that he's trying to get Mr. Whitney to admit to something that
24 is contrary to the truth. However, in that interview and in
25 what was said to them, there was more than just the

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1 implication that both people would be charged. And right,
2 wrong, or otherwise, in his head he's always accepted
3 responsibility for this crime. But I think what's important
4 to remember here is that there's no indication, one, that he
5 was selling marijuana, at least not definitively, or that the
6 marijuana existed in that house to be resold. I don't think
7 that the Government can clearly establish that.

8 But beyond that, there's no indication that that gun
9 was used in connection or possessed in connection with the
10 marijuana in any way to embolden him. Ultimately, what it
11 comes down to is that the possession of the gun in the house
12 does not necessarily mean that it was used in facilitation of
13 any type of marijuana sales, if that could even be
14 established. Ultimately, the key consideration is that the
15 gun was not easily accessible, and the detective -- so much as
16 to testify to that. It was hidden within a zipped compartment
17 that is nestled in a bed frame, and that bed frame is pushed
18 up against the wall. And that's how it was, and that's how it
19 existed in that house. It wasn't something that they were
20 going to -- if he -- if there were either alleged drug sales
21 at the house, outside of the house, that there was any
22 indication that it was consistently moved or that the gun was
23 retrieved. Other than the fact that there was possession of
24 it and its presence of it, there's no connection that
25 emboldened any type of another offense, if another offense

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1 could even be established in this case.

2 As to his statements, he believed that -- he knew the
3 gun was in the house. He knew the marijuana was in the house.
4 The possession of it for him being a felon is that it's
5 constructive. He knew about the gun. It shouldn't have been
6 there, and it's as simple as that. That doesn't mean that the
7 presence of the gun being there was something that he asked
8 for and that the gun was used in any way in connection with
9 any other type of crime.

10 And for those reasons, Your Honor, I'm going to ask
11 that the four-level enhancement does not apply in this case
12 because the lack of the accessibility and the lack of ability
13 to establish that there, in fact, was another felony that was
14 happening.

15 **THE COURT:** Thank you.

16 All right. Just two -- or just, yeah, two quick
17 questions before I give a new date for the continuation of
18 this hearing.

19 Is he still in primary state custody, or has he been
20 transferred over to federal?

21 **MS. ZHENG:** My belief is that at this point he has
22 been. I asked for an in-custody calculation of it, and his
23 expiration date in full from the state sentence should have
24 been September 6th, 2022.

25 **THE COURT:** Okay. And with -- I just want to clarify

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1 that the defense is not disputing that the two felony
2 convictions of either a crime of violence or controlled
3 substance offense applies when calculating the base offense
4 level; is that right?

5 **MS. ZHENG:** I'm sorry, say that again, Your Honor.

6 **THE COURT:** Right. So just so that I know going
7 forward, so the base offense level that Probation has
8 calculated is 24 because the defendant committed the offense
9 subsequent to sustaining two felony convictions of either a
10 crime of violence or a controlled substance offense. There's
11 not an objection to that paragraph; is that correct?

12 **MS. ZHENG:** Correct.

13 **THE COURT:** Okay.

14 **MS. ZHENG:** There's no objection to the fact that he
15 has, in fact, sustained two prior felonies --

16 **THE COURT:** Those are --

17 **MS. ZHENG:** -- that qualify as enhancements.

18 **THE COURT:** -- qualifying offenses. Okay.

19 **MS. ZHENG:** With that said, there was a statement.
20 There was an argument that -- as to his involvement with one
21 of those offenses, that it would seem to overrepresent his
22 involvement.

23 **THE COURT:** So -- but that would just be a 3553(a)
24 factor?

25 **MS. ZHENG:** Correct.

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1 **THE COURT:** Okay. All right. We're going to stop
2 here and pause. I will pick up -- when we return, I will rule
3 on the objections to the four-level enhancement and its
4 application and move forward with the rest of the issues,
5 including the criminal history computation.

6 Mr. Cowhig, did you have something to say before I
7 give a new date?

8 **MR. COWHIG:** Yes, Your Honor, just briefly.

9 I don't have direct information from the state on
10 whether he rolled over into federal custody on September 6th.
11 I know that that was the projected expiration date of his
12 sentence, but I don't know that that actually occurred on the
13 date that was anticipated.

14 **THE COURT:** Sure.

15 And Ms. Zheng said she -- but likely. So I know she
16 wasn't definitively making that representation.

17 All right. So, unfortunately, I've got some trials
18 that are going to be taking up a significant portion of my
19 time in the next couple weeks. So I am continuing this to
20 December 5th at 1:30. So we will pick this up again December
21 5th at 1:30. And I anticipate we'll be able to complete it
22 then.

23 Anything else before we continue this? Mr. Cowhig,
24 anything else?

25 **MR. COWHIG:** No, Your Honor. Thank you.

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